

Feb 21, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,
Plaintiff,
v.
THOMAS GREGORY MYERS,
Defendant.

NO. 2:15-CR-00040-JLQ-1

ORDER RE: MOTION FOR
DISCOVERY AND MOTION TO
RECONSIDER

BEFORE THE COURT is Defendant's *pro se* Motion for Discovery and Motion to Reconsider (ECF No. 60) ("Motion"). Defendant seeks "an order for discovery of evidence in this case" and for the court to reconsider the denial of Defendant's motion to vacate. (ECF No. 60 at 1).

The Motion seeks disclosure of information about all child pornography found on Defendant's computer. (ECF No. 60 at 1). Defendant asserts this evidence will show there was no child pornography on any shared folders on his computer, thereby by making it impossible for him to have distributed child pornography. (ECF No. 60 1-2). Additionally, Defendant argues this evidence will show ineffective assistance of counsel in failing to properly investigate this matter before advising Defendant to plead guilty. (ECF No. 60 at 3-4).

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). However, district courts have the power to allow discovery in a § 2255 proceeding. Rule 6 of the Rules Governing Section 2255 proceedings provides: "[a] judge may, for good cause, authorize a

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1 party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure,
2 or in accordance with the practices and principals of law.” The Ninth Circuit has stated, in
3 the context of habeas litigation, trial courts “should not allow prisoners to use federal
4 discovery for fishing expeditions to investigate mere speculation.” *Calderon v. U.S. Dist.*
5 *Court*, 98 F.3d 1102, 1106 (9th Cir. 1996).

6 Defendant has failed to show good cause for discovery. He continues to collaterally
7 attack his conviction on the same grounds despite this court’s denial of his prior two motions.
8 See (ECF No. 57); (ECF No. 59). Alleged evidence showing the images were not in shared
9 folders is not new. Additionally, even if the Plea Agreement entered into pursuant to
10 Fed.R.Crim.P. 11(c)(1)(C) were voided, Defendant would then be facing all original charges,
11 including receipt and possession of child pornography, which he freely admits he committed
12 in the instant Motion. See (ECF No. 60 at 4).

13 In his Plea Agreement, Defendant waived the right to collaterally attack his conviction
14 except “one based upon ineffective assistance of counsel based on information not now
15 known by Defendant and which, in the exercise of due diligence, could not be known by
16 Defendant by the time the Court imposes the sentence.” (ECF No. 34 at ¶16). Even if the
17 court accepted Defendant’s allegation as true, this does not constitute new evidence or
18 otherwise render the waiver contained in the Plea Agreement unenforceable. Accordingly,
19 Defendant’s Motion for Discovery is Denied.

20 For the same reasons, the court will not reconsider the denial of Defendant’s prior
21 Motion to Vacate. See *Kona Enterprises, Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir.
22 2000) (“[A] motion for reconsideration should not be granted, absent highly unusual
23 circumstances, unless the district court is presented with newly discovered evidence,
24 committed clear error, or if there is an intervening change in the controlling law.”) (quoting
25 389 *Orange Street Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)). The court’s prior
26 analysis remains true. The Motion for Reconsideration is Denied.

IT IS HEREBY ORDERED:

The Motion for Discovery and Motion to Reconsider (ECF No. 60) is **DENIED**.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel and Mr. Myers.

Dated February 21, 2018.

s/ Justin L. Quackenbush
JUSTIN L. QUACKENBUSH
SENIOR UNITED STATES DISTRICT JUDGE